LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 25 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRVING L. ROLLINS
GEORGE D. ZUCKERMAN
BRENDA SOLOFF
Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
Summary of Argument	5
POINT I—The District Court properly exercised its equitable discretion in declining to enjoin state enforcement of its statute	7
POINT II—New York Election Law, Section 457, passed pursuant to the state power to regulate the conduct of elections, is not an unconstitutional restraint of freedom of expression	16
Conclusion	28

CASES

American Communications Association v. Douds, 339 U. S. 382	16, 17, 21
Anderson v. Martin, 375 U. S. 399	21
Associated Press v. Walker, 379 U. S. 47	27
Baggett v. Bullitt, 377 U. S. 360	12
Bates v. City of Little Rock, 361 U. S. 516	27

PAGE

Beal v. Missouri Pac. R. Co., 312 U. S. 45 ..... 7, 12

Bunis v. Conway, 17 A. D. 2d 207 (4th Dept.), *app. dism.* 12 N. Y. 2d 882 (1963) 14

Burroughs and Cannon v. United States, 290 U. S. 534 17

Cameron v. Johnson, 381 U. S. 741 ..... 8, 15

Canon v. Justice Court, 39 Cal. Rptr. 228, 393 P. 2d 428 ..... 17, 19, 25

Cantwell v. Connecticut, 310 U. S. 296 25

Commonwealth v. Evans, 156 Pa. Super. 321, 40 A. 2d 137 ..... 20, 25

Communist Party of the United States v. Subversive Activities Control Board, 367 U. S. 1 ..... 16, 17

DeVeau v. Braisted, 5 A. D. 2d 603, 17 N.Y.S. 2d 596 (2nd Dept.), *aff'd* 5 N. Y. 2d 236, *aff'd* 363 U. S. 144 13-14

Dombrowski v. Pfister, 380 U. S. 479 ..... 4, 5, 7, 8, 11, 14, 15

Douglas v. City of Jeannette, 319 U. S. 157 ..... 3, 4, 7, 8, 9, 12, 13

Evers v. Dwyer, 358 U. S. 202 15

Fenner v. Boykin, 271 U. S. 240 7

Fenster v. Leary, 264 F. Supp. 153 (S.D.N.Y.), *aff'd* 386 U. S. 10 ..... 7, 12, 13, 14

Fenster v. Leary, 20 N. Y. 2d 309 ..... 13, 14

Harrison v. NAACP, 360 U. S. 167 12

Jamison v. Texas, 318 U. S. 413 ..... 17, 26

Katzenbach v. Morgan, 384 U. S. 641 17

Lassiter v. Northampton County Board of Elections, 360 U. S. 45 17

PAGE

Lewis Publishing Co. v. Morgan, 229 U. S. 288 .....17, 20

Lovell v. City of Griffin, 303 U. S. 444 25

Mills v. Alabama, 384 U. S. 214 20

NAACP v. Alabama, 357 U. S. 449 27

New York Times v. Sullivan, 376 U. S. 254 27

People v. Zwickler, Crim. Ct. N.Y.S., Kings Co. Feb. 10, 1965 (unrep'ted) *rev'd* Sup. Ct. App. Term, Kings Co. April 23, 1965 (unrep'ted), *aff'd* 16 N. Y. 2d 1069 (1965) 4

Poulos v. New Hampshire, 345 U. S. 395 17

Schneider v. State, 308 U. S. 147 .....16, 25

Shelton v. Tucker, 364 U. S. 479 16

Spielman Motor Co. v. Dodge, 295 U. S. 89 7

State v. Freeman, 143 Kan. 315, 55 P. 2d 362 .....20, 25

Stefanelli v. Minard, 342 U. S. 117 7

Talley v. California, 362 U. S. 60 .....17, 24, 26, 27

The Bookcase, Inc. v. Broderick, 49 Misc. 2d 351 (Sup. Ct., N. Y. Co. [1965]) 14

Thomas v. Collins, 323 U. S. 516 25

Time Inc. v. Hill, 385 U. S. 374 27

United States v. Harriss, 347 U. S. 612 .....17, 19, 25, 27

United States v. Scott, 195 F. Supp. 440 (N. Dak.) 19, 25, 27

STATUTES

2 U.S.C. §§ 241-256 (Federal Corrupt Practices Act) 18

PAGE

2 U.S.C. §§ 261-270 (Federal Regulation of Lobbying Act) 19

18 U.S.C. § 612 ..... 18, 19, 25

28 U.S.C. § 1253 2

28 U.S.C. § 1343(4) 4

N. Y. CPLR § 3001 ..... 5, 13

N. Y. CPLR § 5601(b)(2) 13

N. Y. CPLR § 6301 15

New York Election Law § 131 10

New York Election Law §132 10

New York Election Law § 133 10

New York Election Law § 139 10

New York Election Law § 143 10

New York Election Law §§ 320-328 ..... 17, 23

New York Election Law § 447 18

New York Election Law § 454 18

New York Election Law § 457 ..... 2, 5, 6, 9, 17, 18, 21, 25, 26, 27

New York Election Law § 458 2

New York Election Law § 460 18

New York Penal Law § 781-b 2, 21, 23

New York Penal Law § 782 2

MISCELLANEOUS

BLEYER, MAIN CURRENTS IN AMERICAN JOURNALISM (1927) 26, 27

PAGE

The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil, 70 YALE L. J. 1084 (1961) 17, 19

Dietsch and Gurnee, *The Cumulative Effect of a Series of Campaign Leaflets* 32 JOURNAL OF APPLIED PSYCHOLOGY 189 (1948) 24

Ernst and Katz, *Speech: Public and Private,* 53 COL. L. REV. 620, 623 (1953) 19

EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (N. Y. 1966) 17

HOVLAND, JANIS AND KELLY, COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953) 24

S. Rep. No. 1390, 78th Cong., 2nd Sess. 2 (1944) Letter from Francis Biddle, Atty. Gen. to Chairman Sen. Jud. Com. (April 7, 1944) 18

WAPLES, BERELSON, AND BRADSHAW, WHAT READING DOES TO PEOPLE: A SUMMARY OF EVIDENCE ON THE SOCIAL EFFECTS OF READING AND A STATEMENT OF PROBLEMS FOR RESEARCH (1940) 23

APPENDIX "A" A1

APPENDIX "B" A17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

against

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

This is an appeal from an order of a three-judge court of the United States District Court for the Eastern District of New York denying a motion by appellant for injunctive and declaratory relief and granting the motion by appellee to dismiss the complaint (R. 34).* Appellant sought to enjoin the enforcement against him of the New York statute prohibiting the distribution in quantity of anonymous campaign literature (R. 5). His motion for a three-

* Numbers in parentheses preceded by the letter "R" refer to pages in the printed record before this Court.

judge district court was granted on May 20, 1966 (R. 12-15) and the order of that Court dismissing the complaint is dated September 29, 1966 (R. 34). This Court noted probable jurisdiction on February 13, 1967 (R. 47).

Opinions Below

The opinion granting the motion to convene a three-judge court (R. 12-15) is not reported. The opinion of the three-judge District Court by Chief Judge ZAVATT is reported at 261 F. Supp. 985 (R. 19-33). The concurring opinion of Court of Appeals Judge KAUFMAN is at 261 F. Supp. 993 (R. 35-37). The dissenting opinion of Judge ROSLING is at 261 F. Supp. 994 (R. 38-44).

Jurisdiction

Appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1253.

Statutes Involved

At the time of the commencement of this action the applicable statutes were N. Y. Penal Law § 781-b and § 782. The statutes are reproduced at pages 2-3 of appellant's brief. Effective September 1, 1967, these statutes became, without change, N. Y. Election Law §§ 457 and 458 respectively. They will hereinafter, for the sake of accuracy, be referred to as N. Y. Election Law §§ 457 and 458.

Questions Presented

1. Did the District Court abuse its discretion in declining equitable relief to enjoin the enforcement of a state criminal statute where the statute is not vague or over-

broad, where appellee, charged with its enforcement, is conceded to act in good faith and where no other special circumstances exist to remove this case from the rule of *Douglas* v. *City of Jeannette*, 319 U. S. 157?

2. Is New York Election Law § 457, prohibiting the distribution in quantity of anonymous campaign literature, an impermissible limitation on freedom of expression?

Statement of the Case

Alleging that he "desires and intends to distribute in quantities of more than a thousand copies" anonymous political leaflets with regard to the election campaign of 1966 "and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966" (Amend. Compl. par. 14 [R. 3-4]), appellant brought this action to declare the statute prohibiting such activity unconstitutional and to enjoin appellee from enforcing the statute against him (R. 5). He alleges that he wishes to make such distribution of a leaflet "prepared by and at the instance of a person other than the plaintiff" (Amend. Compl. par. 14 [R. 3]) because of his belief that the statute forbidding such distribution violates the First and Fourteenth Amendments to the Constitution "in that it is an infringement of the freedom of expression" (*id.* par. 16 [R. 4]).

The complaint seeks federal relief enjoining enforcement of the statute not because the statute is vague or overbroad, not because appellant is being subjected to harassment of any sort and not because any prosecution is pending or imminent. Rather, he asks federal intervention because "[t]he said leaflet is embraced within the scope and intendment of the statute" (*id.* par. 17 [R. 4]), because appellee "is a diligent and conscientious public officer

and pursuant to his duties intends or will again prosecute the [appellant] . . . for his acts of distribution" (*id.* par. 18 [R. 4]) and because, in 1964, appellant was charged with distributing an anonymous leaflet in connection with the Congressional election to be held on November 3, 1964, about four days after the date of distribution (*id.* pars. 5-6 [R. 2]). He was found guilty after a trial at which he presented no evidence. *People* v. *Zwickler* (Crim. Ct. N.Y.C. Kings Co. Feb. 10, 1965, unreported) (*id.* pars. 7-9 [R. 3]). The judgment of conviction was "unanimously reversed on the facts" upon the failure of the People "to establish that defendant distributed anonymous literature 'in quantity'." *People* v. *Zwickler* (Sup. Ct. App. Term, Kings Co. April 23, 1965, unreported) (*id.* pars. 10-11 [R. 3]). The reversal was affirmed without opinion by the New York Court of Appeals. *People* v. *Zwickler*, 16 N. Y. 2d 1069, 266 N.Y.S. 2d 140 (1965) (R. 3). Appellant thus seeks federal intervention with enforcement of a state statute because of his fear of future prosecution under a statute whose scope he comprehends by an officer he regards as "diligent and conscientious" after a previous unsuccessful prosecution.

The District Court declined to intervene. Holding that the amended complaint stated a claim under 28 U.S.C. § 1343(4) and alleged a case or controversy within its adjudicatory power, the Court recognized that "[t]he fact that a case is within the adjudicatory power of this court does not necessarily require that its power be exercised" (R. 23). Both Judges Zavatt and Kaufman found that none of the special circumstances in *Dombrowski* v. *Pfister*, 380 U. S. 479, justified departure from the rule of *Douglas* v. *City of Jeannette*, 319 U. S. 157. "There is no suggestion that the alleged threatened prosecution of the plaintiff in the instant case will be undertaken in bad faith or that the plaintiff's defense to any such prosecution will not assume him adequate vindication of his alleged constitu-

tional rights" (R. 30). Moreover, the Court found that if appellant did not wish to await criminal prosecution, he could institute an action in the state for a declaratory judgment. N. Y. CPLR § 3001. Courts of Appeals Judge KAUFMAN, in his concurrence, also noted that no extensive adjudication would be required to settle appellant's claim and that relief could be as swift in the state as in the federal courts (R. 37).

Judge ROSLING, in his dissent, called the law in question "overbroad" (R. 39) and said that abstention is inappropriate in that it would require "slow, particularistic" litigation (R. 41) in the state courts. He concluded that, under *Dombrowski*, the statute had a "chilling" effect requiring a federal court to declare it unconstitutional.

Summary of Argument

This Court has long recognized the principle that federal courts will not exercise their equitable jurisdiction to enjoin the enforcement of state criminal statutes absent a showing of irreparable injury. This principle applies even to cases arising under the First Amendment. Appellant failed to show such injury to himself in this case and thus did not bring himself within the holding of *Dombrowski* v. *Pfister*, 380 U. S. 479. The statute in question, New York Election Law § 457, regulating the distribution of anonymous campaign literature, is neither vague nor overbroad. Indeed, appellant claimed that his projected activity would fall within the meaning of that statute. The constitutionality of the statute can be swiftly determined in a single state court litigation and there is no showing that such adjudication would be unduly delayed. Moreover, appellant need not wait to be criminally prosecuted since he may seek a declaratory judgment in the state courts. There is no showing that appellant has been

harassed or that any prosecution would be undertaken in bad faith.

In any event, there is no merit to appellant's contention that Election Law § 457 is an unreasonable restraint of free expression. There is a substantial need for the legislation, the legislation is no broader than the need it serves, and no undue prejudice can result from the required limited disclosure. The statute protects the integrity of the electoral process by facilitating the enforcement of various anti-corruption provisions in the New York Election Law requiring reports of campaign receipts and expenditures. Moreover, in an election situation, where the public is being asked to take a definite course of action, it is entitled to know who is urging one position or another and what campaign tactics are being employed by each side. Time is of the essence in an election campaign. Not all charges and countercharges can be answered before the election but the public must at least be able to evaluate for itself any statement made in the light of its source. The New York experience, as outlined in the report of the Special Committee on Campaign Practices, demonstrates the necessity for the legislation.

By limiting itself to the campaign context, the New York statute is unlike the broad disclosure statutes previously struck down by this Court. The limitation of the statute is demonstrated by the fact that none of the well-known anonymous literature of the past falls within its proscription. Furthermore, appellant has not demonstrated any realistic possibility of reprisal resulting from disclosure. Libel and invasion of privacy suits by public officers are now limited in all but the most outrageous cases and there is no proof that disclosure would result in harassment of individuals for their associations or that disclosure is being sought for that purpose.

POINT I

The District Court properly exercised its equitable discretion in declining to enjoin state enforcement of its statute.

The principle that federal courts will not exercise their equitable jurisdiction to enjoin the enforcement of state criminal statutes without a showing of irreparable injury in the absence of such intervention is now a firmly established tenet of our jurisprudence. *Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y.), *aff'd.* 386 U. S. 10; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Stefanelli* v. *Minard*, 342 U. S. 117; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89; *Fenner* v. *Boykin*, 271 U. S. 240. As this Court said in *Douglas* v. *City of Jeannette*, *supra* at 163:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."

Where orderly state process is available to test a claim of constitutionality, respect for federalism requires that the question be adjudicated in the state subject to review by this Court:

> "[F]ederal interference with a State's good-faith administration of its criminal law is peculiarly inconsistent with our federal framework. It is generally

to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski* v. *Pfister, supra* at 484-85.

This principle of non-intervention applies to cases raising claims under the First Amendment (*Douglas* v. *City of Jeannette, supra; cf. Cameron* v. *Johnson,* 381 U. S. 741) and this case provides a striking illustration of why this Court should not adopt the hard and fast rule suggested by appellant and *amicus* that the mere claim of a First Amendment violation renders the principle inapplicable. Equity, proceeding on a case-by-case basis, is fully adequate to protect First Amendment rights while maintaining principles of federalism. Analysis of the instant complaint shows no special circumstances necessitating extraordinary relief.

In only one case has this Court held that the principles of *Douglas* v. *City of Jeannette, supra,* required intervention in the enforcement of a state criminal statute. That case, *Dombrowski* v. *Pfister, supra,* embodied virtually all the elements which this Court previously suggested would mandate intervention and presented peculiar and outrageous facts of its own. In *Dombrowski,* the statute was vague and overbroad thus "chilling" free expression and rendering impossible the resolution of the constitutional questions in a single state prosecution. Moreover, the record, supported by affidavits and a written offer of proof portrayed a history of prosecution raids at gunpoint in the offices and homes of civil rights organization members, the seizure of files and books, and the continued prosecution of appellants after motions to suppress the seized evidence were granted for lack of probable cause. It

showed that harassment had frightened off potential organization members and it showed that the threatened prosecutions were merely part of a scheme of future prosecution under other statutory provisions of state law. It indicated that even with a series of state criminal prosecutions there was no certain or immediate prospect that appellants could have satisfactorily resolved all the constitutional issues in the state courts within a reasonable time and without undue harassment. The instant case, by contrast, presents neither a vague and overbroad statute limiting free expression, nor the possibility of protracted piecemeal state court litigation, nor any question of the statute being used as a weapon to harass appellant or anyone else.

New York Election Law, Section 457 is specifically directed against certain described literature "concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election . . ." without including the printer and the person or committee placing the order. The complaint did not allege that the statute is overbroad and vague. Indeed it alleged that the distribution which appellant desired to make was "within the scope and intendment of the statute" (Amend. Compl., par. 17 [R. 4]). The complaint described the course of action which appellant intended to pursue and alleged that that course would violate the New York statute. Appellant voiced no difficulty in understanding the statute and he did not suggest that it was susceptible to a variety of interpretations which left him in confusion as to his rights.

Apparently recognizing that in order to secure federal intervention and to circumvent the rule of *Douglas* v. *City of Jeannette, supra,* the statute under attack must be at least allegedly vague, *amicus* attempts to inject vagueness into the statute, making far more of a claim for the confusion and uncertainty of appellant than appellant

makes for himself. Thus, *amicus* contends that the statute is vague because it does not define the term "in quantity". The objection is frivolous. Appellant himself sets a figure which he regards as a "quantity" and, in any event, the minimum limit can be immediately and precisely determined by state judicial definition. Moreover, the question of number bears no relation to the nature of the language sought to be uttered. *Amicus* further suggests that the term "in connection with" is impermissibly vague because it leaves undefined the time within which the anonymous circulation may be made. *Amicus* alleges, wholly gratuitously since appellant does not so allege, that "[a]ppellant had to guess whether he was within the time perimeter described by 'in connection with any election'" (Br. *amicus curiae,* p. 6). In fact, appellant alleges with respect to time, only that the distribution for which he was prosecuted occurred four days before the 1964 election (Amend. Compl., par. 6 [R. 2]). The statutory limitation, relating as it does to the specific fact of an *election,* is not at all vague. The New York Election Law, like the laws of other states, contains provisions for commencing the election machinery, including the designation of candidates for nomination and election with time limits for the filing of the required petitions and certificates. N. Y. Election Law §§ 131-133, 139, 143. Once more, the term can, if necessary, be defined in a single state adjudication and, once more, the alleged vagueness does not relate to any confusion as to what speech is proscribed. In short, the attempt by *amicus* to establish collateral areas of vagueness is wholly unavailing. It seems only reasonable that, if a *per se* rule is sought requiring federal intervention with respect to First Amendment claims, and that if one of the allegations with respect to the statute is that it is vague, then it is fair to require that the alleged vagueness relate somehow to the question of free expression.

Appellant suggests (Br., pp. 17-18) that if the statute is to be limited to libelous publication or matter which is

false, then the question of the meaning of the statute becomes very serious. This question is not before the court since the statute, by its terms, does not attempt to assess the nature of the language published and does not promulgate any standards other than that of anonymity. The statute applies to all anonymous campaign literature.

The dissent in the court below considered the statute to be overbroad but rested that feeling on a belief that the statute definitely regulated an area protected by the First Amendment. That is, it considered the statute overbroad only in the sense that any unconstitutional statute invades a constitutionally protected area. However, in order to produce the chilling effect held in *Dombrowski* to raise the possibility of intervention, overbreadth must be regarded as an aspect of vagueness and the "chill" described in that case is the chill of uncertainty of the scope of the statute.

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, *e.g.*, *Smith* v. *California*, 361 U. S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." *Dombrowski* v. *Pfister*, *supra* at 486.

In such cases the scope of the statute is uncertain. Consequently, it cannot be determined whether or not the utterance in question is covered by the statute and this confusion leads, in turn, to the chilling of protected expression.

In the instant case the scope of the statute is clear and the extent of its regulation creates no uncertainty.

Thus, the "chill" created by alleged vagueness and overbroadness is not present and presents no reason for enjoining the statute in question. Although the District Court spoke in terms of "abstention" it obviously did not decline to act because of any uncertainty as to the meaning of the state statute (see *e.g., Baggett* v. *Bullitt,* 377 U. S. 360; *Harrison* v. *N.A.A.C.P.,* 360 U. S. 167) but because of appellant's failure to demonstrate any ground for equitable relief. *Douglas* v. *City of Jeannette, supra.*

Because Election Law, Section 457 is not vague and overbroad, its constitutionality can be swiftly determined in a single state court litigation. While protracted delay in state adjudication is a factor to be considered in determining whether or not equitable intervention is required, *Beal* v. *Missouri Pac. R. Co., supra,* there is no showing in this case that there would be any unreasonable delay in state adjudication of the issue. It appears to be appellant's contention that, having decided to seek relief in the federal courts, he must be accorded that relief since, if it were determined that the state courts were the proper forum "he would be in the same posture as in the district court" (Br., p. 29). In other words, appellant attributes to his own improper choice of forum an unconstitutional delay in state adjudication. This merely demonstrates the paucity of his argument that the state will delay his securing an adjudication.

Illustrative of the fact that the state does not institutionalize delay is the case of *Fenster* v. *Leary,* 264 F. Supp. 153 (S.D.N.Y.), *aff'd.* 386 U. S. 10. In that case, Fenster, having first sought a writ of prohibition against enforcement of the New York vagrancy statute in the state courts, and having appealed through the New York Court of Appeals the question of the appropriateness of prohibition as a remedy to test a statute, sought and obtained a three-judge court on the question of the constitutionality of the New York vagrancy law. That court, like the court

below in the instant case, declined to intervene in the state courts' enforcement of their criminal laws and this Court affirmed that decision. Fenster then sought a declaratory judgment in the state courts pursuant to New York Civil Practice Law and Rules, Section 3001. He was denied relief in the lower court but, on direct appeal to the New York Court of Appeals pursuant to N. Y. CPLR, Section 5601(b)(2), the statute was declared unconstitutional. *Fenster* v. *Leary*, 20 N. Y. 2d 309. The total time from the filing of the federal petition in *Fenster* to the decision of this Court was about eight months, from June 29, 1966 to February 20, 1967. The total time consumed in the declaratory judgment proceeding in the state courts was less than five months, from February 13, 1967 to July 7, 1967. Similarly the total time involved in the criminal prosecution in which this appellant's conviction was reversed was one year and one month from October 29, 1964 to December 1, 1965 (R. 2-8). The instant proceeding was commenced by a complaint filed May 3, 1966, about a year and a half ago and, of course, has yet to be resolved. Any complaint of unreasonable delay in the state courts requiring intervention by the federal courts is, thus, absolutely unfounded.

Nor must appellant become, as he suggests (Br., p. 21), a martyr to his principles. First, while he repeatedly raises the spectre of a felony conviction for a second offense, his conviction having been reversed, he stands in danger only of a good faith prosecution for a misdemeanor in order to test the statute. The "imminence" of a criminal prosecution is not alone a ground for federal equity relief. *Douglas* v. *City of Jeannette, supra* at 163-64. Second, of course, appellant is not confined, in the state courts, to awaiting a criminal prosecution. As *Fenster* v. *Leary, supra,* makes abundantly clear, there is a remedy at law, the declaratory judgment. As the State Appellate Division said in *DeVeau* v. *Braisted,* 5 A. D. 2d 603, 607, 174 N.Y.S. 2d 596, 600 (2nd Dept.), *aff'd.* 5 N. Y. 2d 236,

aff'd. 363 U. S. 144, in upholding the use of a declaratory judgment to test the validity of a penal statute:

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution. . . ."

See also *Bunis* v. *Conway,* 17 A. D. 2d 207, 234 N.Y.S. 2d 435 (4th Dept.), *app. dism.* 12 N. Y. 2d 882; *Bookcase, Inc.* v. *Broderick,* 49 Misc. 2d 351, 267 N.Y.S. 2d 410 (Sup. Ct., N. Y. Co.). These both sustained the use of declaratory judgment to test the constitutionality of penal statutes that were attacked as infringing First Amendment rights. Appellant's claim that declaratory judgment is "discretionary" is meaningless. It is no more discretionary than any equitable remedy. See *Fenster* v. *Leary,* 20 N. Y. 2d 309, *supra.*

Nor does the complaint allege that any prosecution would be in bad faith for the purpose of harassment. In striking contrast to the situation in *Dombrowski* v. *Pfister, supra,* this case presents a "diligent and conscientious public officer" (R. 4) who would, if he undertook any prosecution at all undertake a good faith prosecution. Certainly the previous prosecution does not denote bad faith nor does appellant suggest that it does. The appellant in *Fenster* v. *Leary, supra,* had been prosecuted three times. But the facts there, and the facts here, give no intimation of any program of harassment which would make resort to the state courts an insufficient means of protection.

Appellant suggests that the fact that he is alleging a First Amendment violation makes federal equitable relief a necessity because otherwise he will be denied free ex-

pression during the period of any prosecution which might be undertaken. He overlooks the simple fact that he would be in the same position in the federal courts unless he obtained a temporary injunction pending the outcome of his case. Not only is such relief available in the state courts too (CPLR, Section 6301), but also the logic of appellant's position is that not only must the federal courts intervene in all cases where it is alleged that state penal laws violate the First Amendment, but temporary injunctions must be issued in all such cases. This is indeed drastic relief where, as here, it is conceded that the state officers involved would proceed in good faith, and it is obvious that state processes are adequate to cope with the issue raised and that no undue delay would be involved.

By attempting to substitute a rigid *per se* rule with respect to First Amendment cases for the more responsive equity rule, appellant would completely recast the role of federal equity jurisdiction and alter its position in our federal system. This Court has thus far declined to revamp the system. (*Cameron* v. *Johnson, supra; Dombrowski* v. *Pfister, supra*) and certainly this case indicates no need to do so. *Evers* v. *Dwyer*, 358 U. S. 202, does not require a different result. In that case it was held that the arrest and potential re-arrest of appellant gave him standing to assert the issue of the constitutionality of the statute and thus created a case or controversy. This Court thus reached only the question of jurisdiction and not whether that jurisdiction should be exercised. The question in this case arises only after a finding of jurisdiction. It being clear that the state courts are fully capable of deciding the issue here presented, the District Court did not abuse its discretion in denying federal relief.

POINT II

New York Election Law, Section 457, passed pursuant to the state power to regulate the conduct of elections, is not an unconstitutional restraint of freedom of expression.

Because it found no basis for equitable relief, the District Court did not consider the merits of appellant's claim that New York Election Law § 457 violates his right to freedom of expression. This disposition was entirely proper. If, however, this Court should adopt the rule urged by appellant, then it is clear that the statute, prohibiting the distribution of anonymous campaign literature is a necessary implementation of the state's duty to regulate the election process and does not constitute an unreasonable restraint of free expression. In assessing a statute like Section 457, three factors must be weighed. The first is whether or not there is a legitimate state purpose in enacting the legislation and a substantial need for it. *American Communications Association* v. *Douds,* 339 U. S. 382; *Schneider* v. *State,* 308 U. S. 147, 161. The second consideration is whether or not there is a "substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve". *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U. S. 1, 93; *Shelton* v. *Tucker,* 364 U. S. 479. The third factor, a necessary corollary of the second, is whether or not the statute involves an unnecessary restraint on free expression and whether disclosure might unduly prejudice those of whom disclosure was required. *Communist Party of the United States* v. *Subversive Activities Control Board, supra; American Communications Association* v. *Douds, supra.*

In applying this test, this Court has consistently upheld limited disclosure statutes serving a strong governmental

interest. *Communist Party of the United States* v. *Subversive Activities Control Board, supra; United States* v. *Harriss,* 347 U. S. 612; *Poulos* v. *New Hampshire,* 345 U. S. 395; *American Communications Association* v. *Douds, supra; Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. The New York statute completely satisfies all of the requirements enunciated by this Court in sustaining legislation which is challenged on First Amendment grounds.*

New York Election Law, Section 457 is carefully limited to anonymous campaign literature. It is not directed at all literature printed any time under any circumstances. *Talley* v. *California,* 362 U. S. 60; *Jamison* v. *Texas,* 318 U. S. 413. It does not restrict the circulation of anonymous literature dealing with ideas or even with current issues. See *Canon* v. *Justice Court,* 39 Cal. Rptr., 228, 393 P. 2d 428, 431. It is directed solely at literature respecting candidates and propositions on the ballot. It requires only that the printer and author or sponsor be identified on literature circulated in quantity to influence the electorate in their choice. The statute serves the legitimate state purposes of insuring the purity of the electoral process (*Burroughs and Cannon* v. *United States,* 290 U. S. 534) and promoting the intelligent use of the ballot. *Katzenbach* v. *Morgan,* 384 U. S. 641; *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45.

The statute protects the integrity of the electoral process first by facilitating the enforcement of various anti-corruption provisions in the Election Law. These include, for example, New York Election Law §§ 320-328 with

---

* To the extent that other theories have been advanced for the weighing of First Amendment claims, Election Law, Section 457 satisfies the requirements of those tests as well. See *e.g.,* EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (N. Y. 1966), pp. 104-105 and "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L. J. 1084 (1961).

respect to requirements for filing reports on campaign receipts, expenditures and contributions, § 447 respecting political assessments, § 454 respecting contributions from judicial candidates and § 460 respecting campaign contributions from corporations. To the extent that these sections might be circumvented by the expenditure of funds on anonymous literature, § 457 operates to prevent such a possibility. In this respect it is very similar to the federal provision, 18 U.S.C. § 612, which also was enacted to enforce other provisions of the Federal Corrupt Practices Act. 2 U.S.C. §§ 241-256. See S. Rep. No. 1390, 78th Cong., 2d Sess., 2 (1944) Letter from Francis Biddle, Atty. Gen. to Chairman of Sen. Jud. Com. (April 7, 1944).

The second important interest served by Section 457 is the right of the public to identify the sources urging it to follow a certain course with respect to an election and the concomitant ability to evaluate material in light of the sources. It cannot be denied that disclosure of the source of information is an important factor in ascertaining the weight to be given any particular proposal. This is especially true in the modern era of mass communications.

> "As the market place changed from quill and parchment to printing press, camera and vacuum tube, the testing of truth increasingly required disclosure of the writer and of the source of financial support of the media of communication. The historic anonymity of the author is not be analogized with the anonymity of the dissemination of ideas in the vast quantities presently possible. Perhaps in more leisurely times the theory that ideas might be evaluated by themselves was a practicable one. In these hectic days when the facts upon which action must be based are numerous and, in many cases, understandable only by experts, the busy citizen has neither the time nor the faculties to analyze each idea presented to him and must,

therefore, depend upon the status and reputation of those who espouse it". Ernst and Katz, "Speech: Public and Private", 53 Col. L. Rev. 620, 623 (1953).

The importance of being able to identify the source of material is particularly urgent in an election context. As opposed to a general and continuing debate on issues, an election requires the taking of a position with respect to questions of grave importance in a severely limited period of time. Cf. 70 Yale L. J. *supra* at 1115, n. 194. In a situation where action is required, the public is entitled to know all of the relevant factors, including who supports and who opposes a particular candidate, before it can be requested to choose among them. This is the rationale of the Federal Regulation of Lobbying Act and is applicable equally to the election process. As this Court said in *United States* v. *Harriss, supra* at 625:

> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myraid pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . .
>
> Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from this who for hire attempt to influence legislation or who collect or spend funds for that purpose."

See also *Canon* v. *Justice Court, supra* at 431; *United States* v. *Scott,* 195 F. Supp. 440 (N. Dak.) (upholding the federal law 18 U.S.C. § 612); *Commonwealth* v.

Evans, 156 Pa. Super. 321, 40 A. 2d 137; *State* v. *Freeman,* 143 Kan. 315, 55 P. 2d 362. The purpose of identification in no way depends upon the nature of the material printed since the right to know in an election situation embraces the right to know who is speaking in favor of as well as who is opposing a candidate, and who is campaigning with ideas as well as with invective. See also *Lewis* v. *Morgan Publishing Co., supra* at 312. Appellant's assertion that the source of a statement is not necessary to an evaluation of its truth, overlooks the fact that campaign literature often deals not in statements of truth or falsity, but in emotional appeals which contain not facts and not ideas but personal factors which may create as strong an impression as a statement relating to the issues in the campaign. Identification of the source of this material would help the public to assess whether or not that source is so potent or important a figure or committee on the side espoused that it wishes to retaliate at the polls. Moreover, of course, the faceless adversary in an election campaign, as in a courtroom, cannot be subjected to public questioning with respect to his position.

Not only does publication of literature with respect to a campaign pressure the public to take sides without providing for the information as to the source of the pressure, but it does so within a period of time which makes it difficult, if not impossible, to ascertain the source before the choice must be made. This is an impermissible imposition both on the public and on the candidates.

This Court has long recognized that time is of the essence in an election campaign. *Mills* v. *Alabama,* 384 U. S. 214, 220. In that case the Court recognized that a law which made it a crime in effect to answer "last minute" charges on Election Day was unconstitutional because that was "the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from con-

fusive last-minute charges and counter charges.'" See also *Anderson* v. *Martin*, 375 U. S. 399, 402; *American Communications Association* v. *Douds, supra* at 406. The question of identification after the election is completely irrelevant to the determination which the public must make with respect to the election and to the answers which the candidate must make with respect to any charges, innuendoes or emotional appeals.

Nor is the statutory refusal to sanction anonymous campaign literature purely hypothetical or academic. The New York statute, like the federal statute and the statutes of 36 sister States* is rooted in experience. New York Election Law, Section 457 was enacted in 1962 as an amendment to New York Penal Law, Section 781-b. The original Section 781-b dealt only with printing anonymous campaign literature and was the result of anonymous appeals to ethnic background and other personal factors in the 1940 Presidential election campaign. The 1962 amendment to

---

* ALA. CODE tit. 17, § 282 (1940); ALASKA STAT. § 15.55.030 (1962); ARK. STAT. § 3-1412 (1947 Ann.); CAL. ELECTIONS CODE § 12047-49 (1965); COLO. REV. STAT. § 49-21-50 (1963 Ann.); FLA. STAT. ANN. § 104.37 (Supp. 1966); IDAHO CODE ANN. § 34-104 (1953); ILL. ANN. STAT. ch. 47, §§ 26-1.3 (1963); IOWA CODE tit. 35, § 738.22 (1966); KAN. STAT. ANN. § 25-1714 (1913); KY. REV. STAT. §§ 123.095, 123.130 (Supp. 1966); LA. REV. STAT. § 18:1531 (1950); ME. REV. STAT. ANN. tit. 21, § 1575 (1964); MD. CODE Art. 33, § 221 (1957); MASS. ANN. LAWS ch. 56, §§ 39, 41 (1952); MICH. STAT. ANN. § 6.1914; MINN. STAT. § 211.08 (Supp. 1963); MO. REV. STAT. tit. 9, § 129.300 (1939); MONT. REV. CODES § 94-147S (1947); NEB. REV. STAT. § 32-1131-33 (Supp. 1965); N. H. REV. STAT. tit. IV, § 70.14 (Supp. 1965); N. J. STAT. ANN. §§ 19:34-38.1-4 (1963); N. D. CENTURY CODE § 16-20-17.1 (1959); OHIO REV. CODE § 3599.09 (Supp. 1966); ORE. REV. STAT. tit. 23, chap. 268, § 260.360 (1955); PA. STAT. ANN. tit. 25, § 3546 (1933); R. I. ELECTION LAW § 17-23-2 (1923); S. D. CODE 1939 § 16.9930 (Supp. 1960); TENN. CODE § 2-2238 (1955); TEX. ELECTION CODE Art. 14.10 (1951); UTAH CODE § 20-14-24 (1953); VT. STAT. ANN. tit. 17, chap. 35, § 2022 (1963); VA. CODE 1950 § 24-456; WASH. R.C.W.A. § 29, 85.270 (1965); W. VA. CODE 1961, chap. 3, § 218(6) (a-b) (Supp. 1965); WIS. STAT. ANN., tit. II, chap. 12, § 12.16 (1911).

the statute was the direct outgrowth of an investigation into the charges and counter charges hurled during the 1961 Mayoralty Democratic Primary campaign in New York City. The two principal candidates for the Democratic nomination for Mayor, the incumbent, Robert F. Wagner, Jr. and State Comptroller Arthur Levitt each charged that anonymous literature was being circulated by his opponent.

Wagner headquarters charged that the regular Bronx Democratic organization circulated a packet of literature implying that the Mayor was a "Communist puppet" and the Levitt headquarters charged that Sanitation Department employees in Queens distributed an anonymous anti-Semitic leaflet against the Comptroller. An investigation was conducted by a Special Assistant Attorney General who was counsel to the New York Fair Campaign Practices Committee and attorneys of standing independently selected, who served without compensation (A4). The investigation was conducted with the cooperation of the National Fair Campaign Practices Committee, Inc. The investigation committee submitted an interim report annexed hereto as Appendix "A" and a final report annexed hereto as Appendix "B". It was established that the Wagner charge that the regular Democratic organizations in the Bronx and Brooklyn circulated the "Communist puppet" literature was true (A3, A18). That literature was characterized by one of the persons involved in the circulation as "brilliant" in conception. He said that the distribution was dictated by "politics" and that "we were fighting for our political life" (A7).

An examination of the records of the Club circulating the literature disclosed no evidence of expenditures for the printing of such literature (A19). Moreover, a major portion of the 1961 Primary campaign receipts of the Club in question were not recorded and neither the Treasurer nor any person associated with the political committee for the

District had filed a financial statement with the Secretary of State as required by Section 324 of he Election Law, nor had a statement been filed identifying the Treasurer of the Committee as required by Section 325 of the Election Law and most important, Section 327 of the Election Law requiring the Treasurer of a political committee to maintain a detailed account of campaign receipts and expenditures including a receipted bill stating the particulars of each expense had not been compled with (A22-A23). The charge that Wagner workers had distributed an anti-Semitic leaflet was not established (A3, A18). Indeed, the source of the anti-Semitic literature was never established. Expert printers informed the investigators that the anonymous leaflets had been printed by an unskilled and inexperienced person and Wagner headquarters felt that the circular was an "opposition plant" (A14).

The Committee recommended the removal of the "cloak of anonymity" (A29-A32), recommending that Section 781-b of the Penal Law be amended to prohibit printing, publishing or distributing of anonymous campaign literature or causing such literature to be printed, published or distributed. They also recommended that the literature be required to bear the name and address of the printer and the person and organization ordering the material. The recommendations of the Committee were, for the most part, incorporated in the revised legislation. The new statute was supported by the National Fair Campaign Practices Committee, the Association of the Bar of the City of New York, the Citizens' Union and the Democratic, Republican and Liberal parties.

The exact impact of anonymous literature on opinion cannot, of course, be precisely assessed. However, it is a well-known phenomenon that the printed word carries an impact of its own which tends to incline the recipient of literature in the suggested direction, even if the literature is anonymous. See WAPLES, BERELSON AND BRADSHAW,

WHAT READING DOES TO PEOPLE: A SUMMARY OF EVIDENCE ON THE SOCIAL EFFECTS OF READING AND A STATEMENT OF PROBLEMS FOR RESEARCH (1940), pp. 108-109. This fact has even been demonstrated in the area of campaign literature where it was found that an anonymous leaflet on a controversial subject tended to change the opinion of the recipient of that leaflet in the direction of the position it advocated. Dietsch and Gurnee "The Cumulative Effect of a Series of Campaign Leaflets", 32 Journal of Applied Psychology, 189, 194 (1948). A written communication will cause a change in opinion even if the source or author is one of "low-credibility". Low credibility may result from an author with an antagonistic view or from anonymity. A person who has read the argument tends to disassociate the contents from the communicator. While he forgets the source, he remembers the text and his attitude is changed by it as long as he is not reminded of the source. HOVLAND, JANIS AND KELLY, COMMUNICATION AND PERSUASION: PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953), pp. 280-81. In an election context, of course, where the source is not identified, no one can be reminded of it.

The law thus arises out of a legitimate state purpose. Its need is amply demonstrated by the local and national history and its scope is no broader than the interest to be served since anonymity is the problem, not the utterance itself.

Appellant studiously avoids any discussion of the need for the legislation in question and the substantial State purpose which it serves. Instead he relies principally on the decision of this Court in *Talley* v. *California, supra,* which prohibited the dissemination in any place, under any circumstances, of any anonymous literature. In that case there was no need shown for the enactment of such a sweeping provision and no valid state interest was served in its enactment. However, as we have said, where a

valid state purpose is shown, this Court has upheld disclosure requirements. The most analogous situation to that in the instant case is that in *United States* v. *Harriss, supra,* in which this Court held that members of Congress had the right to know who was urging support for particular legislation. In an election situation where the choices are more varied and the issues more complex, the need is even more pressing to require such disclosure. Several states have upheld the constitutionality of such legislation based on the right of the public to know in an election campaign who is supporting and who is opposing a particular candidate. *Canon* v. *Justice Court, supra; Commonwealth* v. *Evans, supra; State* v. *Freeman supra.* Moreover, federal legislation, 18 U.S.C. § 612 has been upheld on the same grounds. *United States* v. *Scott, supra.*

Appellant's reliance on *Thomas* v. *Collins,* 323 U. S. 516 is wholly misplaced. In that case a statute requiring prior registration of a speaker was struck down. It cannot be said that one who presents himself in person to a group in order to deliver a speech is very anonymous. Even if his name is not revealed, his position can be questioned on the spot as can his associations. Moreover, the statute there was not directed at the election process and, indeed, a registration provision is, in general, wholly unlike a requirement of disclosure on the material circulated. Registration provisions very often vest in the registration official a discretion to regulate either the manner or content of the material being distributed. Such legislation is uniformly held to be unconstitutional. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Schneider* v. *State, supra; Lovell* v. *City of Griffin,* 303 U. S. 444. However, the Court has indicated that a statute going no further than merely requiring previous identification with respect to an activity in which the state had a substantial interest would be sustained. *Thomas* v. *Collins, supra* at 539; *Cantwell* v. *Connecticut, supra* at 306. New York Election Law, Section 457 is not a registration statute. It contains no prohibition of any

kind against the free expression or publication of political literature and it does not require prior licensing or any other form of permission. It vests no discretion in any official to grant or withhold permission to print or distribute campaign literature. It requires only limited disclosure for the specific purpose of election campaigns.

Appellant's recital of the long history of anonymous literature serves merely to heighten the distinction between the limited New York statute and the broad provisions struck down in *Talley* v. *California, supra.* See also *Jamison* v. *Texas, supra* at 416. The most famous anonymous literature in American history, the Federalist papers, although they relate to a question on the ballot, were published in newspapers and consequently would not fall within the prohibition of Election Law, Section 457. See generally BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM (1927), p. 102. Accordingly, appellant's concern about the professional standing of Alexander Hamilton and John Jay after the publication of these letters, is groundless (App. Br., p. 10). The letters of Junius appeared in the London Public Advertiser from 1769 to 1772. The publisher was prosecuted for seditious libel based on one of the letters which was addressed to the King and which protested the policies of the Government. The jury acquitted. BLEYER, *supra* at 23-27. These letters by their appearance in the newspaper would not fall within Section 457 if published in this country. Moreover, since they did not relate to any election campaign they would not have fallen within the statute even if they were circulated as anonymous hand bills. The letters of Cato appeared from 1720 to 1723 in British newspapers and were reprinted in colonial newspapers. They concerned theories of liberty and representative government. Once more not only did these letters appear in newspapers, but they were unrelated to any election campaign. BLEYER, *supra,* at 23, 55, 64. The trials of James Franklin and John Peter Zen-

ger would also not have fallen within the provisions of Election Law, Section 457. BLEYER, *supra* at 58-63.

The basic argument against a statute such as Election Law, Section 457 is the fear of reprisal. This is the theory of the argument to history most recently expressed in the majority opinion in *Talley* v. *California, supra.* Since the decision in that case, however, this Court has taken great strides in extending the First Amendment directly. *Associated Press* v. *Walker,* 379 U. S. 47; *New York Times* v. *Sullivan,* 376 U. S. 254; and *Time, Inc.* v. *Hill,* 385 U. S. 374, now effectively insulate political criticism from the threat of libel and invasion of privacy suits except in the most outrageous and egregious cases. The pre-revolutionary constitutional literature, while a vital part of our heritage, sprang from an atmosphere of governmental oppression which they simultaneously served to destroy. The cloak of anonymity was a substitute for the free speech which the First Amendment was designed to insure. Now that the threats of civil and criminal libel prosecutions have been removed, the possibility of reprisal cannot be assumed. Certainly appellant's reliance on *Bates* v. *City of Little Rock,* 361 U. S. 516 and *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, is misplaced. Those cases presented concrete proof of the existence of a hostile atmosphere and the threat of reprisal against members of the organization. Moreover, the scope of disclosure required in those cases was far broader than the disclosure required in Section 457. While Section 457 requires the names of only the printer and the person or committee who authorized the printing and distribution, the *N.A.A.C.P.* cases required entire membership lists to be placed on public file. Indeed it seems very clear from those cases that disclosure was required for the purpose of reprisal.

CONCLUSION

For the foregoing reasons, the decision below should in all respects be affirmed.

Dated: New York, New York, September 22, 1967.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRVING L. ROLLINS
GEORGE D. ZUCKERMAN
BRENDA SOLOFF
Assistant Attorneys General,
of Counsel.

APPENDIX "A"

INTERIM REPORT

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Mayoralty Primary

Introduction

This is an interim report of the Attorney General's investigation into the printing and distribution of anonymous "hate literature" during the 1961 primary campaign for Mayor in New York City.

The present inquiry was instituted at the request of the two Democratic primary candidates, New York State Comptroller Arthur Levitt, the "regular" organization candidate and Mayor Robert F. Wagner.

In the last days of the primary campaign a torrent of charges and counter-charges concerning the printing and distribution of anonymous "hate literature" emanated from the two opposing Democratic factions.

We have restricted our investigation to complaints concerning *anonymous* "hate literature", which may be violative of § 781-b of the Penal Law. This statute provides criminal penalties for the printing of any campaign literature which does not identify the printer or sponsoring organization. The full text of this statute is as follows:

> "§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce

in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party, candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, circular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

Our interim report concerns two such complaints: (1) The Wagner charge that the regular Bronx Democratic organization circulated a packet of anonymous "hate

literature" implying that the Mayor was a "Communist Puppet"; and (2) the Levitt charge that Sanitation Department employees in Queens, distributed an anonymous "Anti-Semitic" leaflet directed against the candidacy of Comptroller Levitt.

After exhaustive investigation we have established that the regular Democratic organizations in the Bronx and Brooklyn did, in fact, distribute the anonymous packet implying Wagner was a "Communist Puppet".

We have found no evidence to support the Levitt complaint that an "Anti-Semitic" leaflet was distributed by Wagner workers or anyone else. Indeed, the Queens Democratic leader who purportedly brought this leaflet to the attention of Levitt headquarters has questioned its origin and authenticity.

Initiation of Investigation

On August 31, 1961, Comptroller Levitt, one of the two candidates in the Democratic mayoralty primary, issued a public statement which, in part, charged that New York Sanitation Department employees were making anti-semitic arguments and circulating anti-semitic leaflets in support of Mayor Wagner's candidacy. This public charge was supported by the release of the "Anti-Semitic" leaflet, purportedly being distributed. On September 1, the Comptroller sent a formal letter of complaint to the Attorney General requesting an investigation.

Mayor Wagner denied any knowledge of the charge and requested that the Fair Campaign Practices Committee, a national non-partisan organization, initiate an inquiry. On September 4, the Attorney General asked the Fair Campaign Practices Committee to nominate an attorney who would be appointed a Special Assistant Attorney General under § 69 of the Executive Law to conduct the requested investigation.

Two days later, on September 6, the Attorney General appointed John G. Bonomi, a Special Assistant Attorney General pursuant to the recommendation of this Committee. The New York City Fair Campaign Practices Committee was organized on the same day, under the aegis of the national group. To assist in the probe Special Assistant Attorney General Bonomi nominated, the New York City Fair Campaign Practices Committee approved, and the Attorney General appointed the following Special Assistant Attorneys General: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand; Walter Wager; and Thomas Weaver. All are practicing attorneys and served on a part time basis, without compensation.

At the request of Special Assistant Attorney General Bonomi, the Superintendent of the New York State Police assigned two investigators to the staff for the conduct of field investigations.

Wagner Charge

On September 6, 1961, Mayor Wagner charged that the regular Bronx Democratic organization was circulating a packet of anonymous "hate literature' implying that he was a "Communist Puppet". This packet consisted of the following four pieces of literature which bore neither the identity of the printer nor the sponsoring organization:

(1) A poster featuring a cartoon in which Mayor Wagner is depicted as a puppet of ex-Senator Herbert Lehman, Mrs. Eleanor Roosevelt, and three labor leaders. A caption on the poster urges voters to "Stop" Lehman, Mrs. Roosevelt et al. and "their Puppet Wagner and all other Splinter Groups, A.D.A.'s and Left Wingers from taking over the Democratic Party";

(2) A poster with the caption "LEHMAN'S NIECE BAILS SOVIET SPY SOBLEN". The body of this poster consists of a copy of an article appearing in the August 29, 1961 issue of the New York Daily News concerning Dr. Robert Soblen, recently convicted of espionage for the Soviet Union. The portion of the article which notes that Lehman's niece furnished bail for Soblen is encircled;

(3) A copy of a photograph of Mayor Wagner with Mrs. Roosevelt which appeared in the August 22, 1961 issue of the New York Post; and

(4) An article in the January 17, 1953 issue of "The Tablet" lauding Comptroller Levitt's anti-communist activities.

The Mayor referred to this packet as "the most scurrilous kit of campaign literature in the history of American politics".

"What is more" the Mayor stated, "reports have reached us that these anonymous leaflets were masterminded by Boss DeSapio and carried out by Boss Buckley's machine in the Bronx. We know that envelopes similar to these were addressed by clubhouse members all last week to special Irish mailing lists. We have received reports that the leaflets were stuffed in Boss Buckley's own clubhouse under the direction of Philip Gilsten, the discredited former Deputy City Treasurer."

INVESTIGATION OF WAGNER CHARGE

In our investigation of the Wagner charge we interviewed about one hundred persons including Philip Gilsten, the Democratic leader in the 8th Assembly District in the Bronx and Executive Member of the North End

Democratic Club, 416 East 189th Street, The Bronx; Benjamin Gluckow, Secretary to Congressman Charles Buckley and Secretary of the North End Democratic Club; New York City Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn; Carmine DeSapio, former Chairman of the New York County Democratic Committee; registered Democratic voters in the 3rd Assembly District of The Bronx; printers of campaign literature; and campaign consultants to the opposing groups in the Democratic primary.

The original complaint concerning the anonymous "Communist Puppet" kit was made by a family residing in the 3rd Assembly District in the Bronx. This family had received the anonymous kit by mail in an unmarked envelope.

Interviews in the field with registered Democratic voters in the complainant's neighborhood established that a number had received identical kits in unmarked envelopes.

On October 4 two Special Assistant Attorneys General, Donald A. Hopper and Allan A. Pines, interviewed Philip Gilsten at the executive offices of the North End Democratic Club, the so-called "[Congressman] Buckley clubhouse".

Gilsten readily admitted that the anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Gilsten stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in

the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club while others were circulated by the regular Democratic clubs in their own areas.

Gilsten characterized the anonymous "Wagner Puppet" leaflet as "brilliant" *in conception*. He said the distribution of the anonymous kit was dictated by "politics" and commented "we were fighting for our political life".

Benjamin Gluckow, Secretary to Congressman Charles Buckley and an officer of the North End Club, confirmed Gilsten's statements concerning the distribution of the "Communist Puppet" kit. Upon interview, he stated that he and other workers in the regular Bronx Democratic organization prepared the anonymous kit at the North End Club. He described his role as "stuffing envelopes" with the four leaflets. Gluckow volunteered the information that the North End Club had special "Irish, Italian and Jewish" mailing lists and that the "Communist Puppet" kit "probably went to the Irish list".

Councilman Thomas J. Cuite, the co-ordinator of the Levitt primary campaign in Brooklyn, admitted that the anonymous "Communist Puppet" kit was distributed in Brooklyn through the Levitt campaign headquarters in that borough.

Cuite said that on Friday, September 1, 1961 an unknown "printer" notified him by telephone that certain Levitt campaign literature could be picked up at a "printing or binding firm in Mount Vernon, New York". He said that since he was unable to make arrangements for a Friday pick-up the unknown "printer" said that he would leave the materials at a Democratic club in the Bronx "one block south of Fordham Road . . . right near Webster Avenue". According to Cuite, the following morning, September 2, he set out in search of this Democratic Club.

By meticulously following the travel directions of the unknown "printer" Cuite said he arrived at the North End Democratic Club. Cuite further related that upon arrival at the club he was ushered into its executive offices and introduced to Philip Gilsten. Then Cuite said "In that room I asked if there was any material for the Levitt campaign for Brooklyn headquarters. And the gentleman whom I was speaking to called for some other man and told him I was there to pick up the material for Brooklyn". This latter person, whom Cuite is unable to identify, then guided the Councilman to a public garage situated on an obscure sidestreet in the Bronx. Then Cuite and his unknown guide transferred nine cartons of Levitt campaign literature from a car parked in the garage to Cuite's automobile.

According to Cuite, it wasn't until the following Tuesday, September 5, that he discovered that the nine cartons contained three of the four leaflets included in the anonymous "Communist Puppet" kit. The Councilman said that he stored the closed cartons in the assembly room of Levitt's campaign headquarters in Brooklyn over the Labor Day weekend and they were not opened until September 5. Councilman Cuite said that he obtained the fourth anonymous leaflet in the "Communist Puppet" kit directly from a firm known as the Seminole Printing Corporation.

Cuite stated that Levitt's Brooklyn headquarters distributed the anonymous "Communist Puppet" literature to the borough's regular Democratic leaders for use in their home areas.

As noted previously, one of the anonymous circulars included in the "Communist Puppet" kit was a copy of an article appearing in "The Tablet", praising Comptroller Levitt's anti-communist activities. We have established that 100,000 copies of this anonymous circular were

printed by Seminole Printing Corporation, Inc., 225 Varick Street, New York. Another 50,000 copies of the circular were printed by Printolith Corp., 118 East 25th Street, New York, at the request of the Seminole Corporation.

Joseph Cohen, the proprietor of Seminole was unable to explain the absence of any printer's or sponsor's identification on this circular. Max Weiss, the president of Printolith admitted the omission of any identification on the anonymous "Tablet" circulars he printed.

William Volet, Executive Assistant to Comptroller Levitt, placed the two orders with Seminole. There is no evidence that Volet instructed either printer to omit the identification required under the law.

Our investigation to determine the printer of the three other anonymous circulars included in the "Communist Puppet" kit has been temporarily delayed by an order of Justice George Tilzer of the New York State Supreme Court restraining the Attorney General from obtaining the books and records of the North End Democratic Club. In order to ascertain whether the North End Club ordered this anonymous literature we served Philip Gilsten on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of the Club. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. On Sunday, October 8, Justice Tilzer signed an order to show cause why both subpoenas should not be vacated or modified. He also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance of Gilsten" or the production of North End's books. The Attorney General is further restrained under this order from proceeding against Gilsten for contempt. As of this date the motion is still pending in Part I of the Supreme Court.

Appendix "A"

Upon interview Carmine DeSapio denied Mayor Wagner's charge that he "masterminded" the "Communist Puppet" kit. Our investigation has uncovered no evidence that DeSapio either "masterminded" or participated in any way in the distribution of this literature.

LEVITT CHARGE

On August 31, 1961, Comptroller Levitt issued a public charge that campaign workers for Mayor Wagner had injected anti-Semitism into the Democratic primary contest. Comptroller Levitt said, "I have confirmed that 600 workers of the Sanitation Department are working in Queens . . . using the argument that a victory for Levitt will leave a Jew to run against a Jew—Levitt v. Lefkowitz". On the same date Levitt headquarters released a photographic copy of what a spokesman called a sample of the anti-Semitic literature allegedly distributed in Queens. This "Anti-Semitic" circular bore the legend:

IRISH AMERICAN DEMOCRATS
VOTE FOR WAGNER
On Primary Day
Thurs. Sept. 7th
3 PM to 10 PM
OR ELSE YOU WILL HAVE
A LEVITT OR A LEFKOWITZ AS MAYOR

The LEVITT headquarters identified Matthew Troy, Jr., Democratic Leader in the 9th Assembly District, Part A in Queens and Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization, to the press as the sources of these charges. This public statement received wide publicity in the metropolitan newspapers and appeared on page one of the New York Times on September 1.

Appendix "A"

On September 1, Comptroller Levitt sent a formal complaint to the Attorney General which stated in part that "groups have been busy going into the non-Jewish areas using the argument that unless Wagner is elected in the Primary 'the Jews will take over City Hall'.

"The history of this kind of campaign is not new in American politics. Every major Jewish figure has been subjected to it. I can recall instances in the past when this same vile literature—unattributed, irresponsible, bigoted in every respect—was used against Herbert Lehman . . . I am asking for nothing more than what he has always asked—that the purveyors of this literature and the whispering hate mongers be stopped". (Underlining added by our staff)

To support this charge of the distribution of anti-Semitic literature the Comptroller attached as an exhibit "a photostatic copy of literature addressed to Irish-American Democrats"—the anonymous "Anti-Semitic" leaflet to which we have previously referred. The Levitt complaint included no evidence in this matter beyond the naked charge and the copy of the "Anti-Semitic" leaflet. On the same evening the Comptroller appeared on NBC—TV and repeated the charge. At that time he once again exhibited a copy of the anonymous "Anti-Semitic" leaflet. Two days later, on September 3, Comptroller Levitt stated on the "Direct Line" television program, "these instances of anti-Semitic literature were brought to my attention from responsible sources" (underlining added by our staff).

INVESTIGATION OF LEVITT CHARGE

During the course of this inquiry into the anonymous "Anti-Semitic" circular over 100 witnesses were interviewed, including Frank Lucia, New York City Commissioner of Sanitation; a considerable number of Sanitation

Department supervisors and employees active in the Wagner primary campaign; campaign advisors to the Mayor; registered Democratic voters in the 9th Assembly District in Queens; the Democratic leader of Part A of that Assembly District, Matthew Troy, Jr.; Harold Fisher, Chairman of the Law Committee of the Brooklyn Democratic organization; former Justice Daniel V. Sullivan, Levitt's campaign manager; William Vanden Heuvel, a Levitt campaign consultant; and Irwin Rosenthal, a researcher at Levitt headquarters at the Hotel Biltmore, Manhattan.

Our investigation established that in August, 1961 Sanitation Commissioner Frank Lucia organized a 9th A. D. Independent Citizens Committee for Wagner in the Queens Village area. About seventy persons, mainly Sanitation Department employees, "volunteered" or were recruited by the Uniformed Sanitationmen's Union as workers for this Committee. During the period before the September 7 primary this Wagner Committee conducted a highly organized campaign on behalf of the Mayor, including door-to-door canvassing and distribution of literature. The Levitt group charged that these campaign workers were making anti-Semitic arguments and distributing the anonymous "Anti-Semitic" circular.

Matthew Troy, Jr., identified by the Levitt group as the person who originally brought the "Anti-Semitic" circular to their attention gave sworn testimony before our staff on two occasions. Troy said that several weeks before the primary he began to receive reports that sanitation workers with the 9th A. D. Citizens Committee for Wagner, were making anti-Semitic arguments in door-to-door canvassing. He said that he transmitted these reports to Irwin Rosenthal, a member of the Levitt research staff. Troy further stated that, on the urging of Rosenthal, he went to regular Democratic headquarters in the Biltmore

Hotel and repeated these reports to Levitt's campaign advisors.

He said that he was asked at that time whether any anti-Semitic circulars were being distributed in the Queens Village area. Troy said that he told the Levitt advisors that no such reports had been made to him. According to Troy he saw a copy of the "Anti-Semitic" leaflet for the first time on September 1 at Levitt headquarters in the Biltmore Hotel. The questioning of Troy was as follows:

> Q. Well, sometime before September 1st, when Mr. Levitt appeared on television with this exhibit did you see an original of the circular at the Biltmore? A. Yes, I believe it was on September 1st that I saw it. . . .
>
> Q. Did you bring that original to the Biltmore? A. No, I did not.
>
> Q. Do you have any knowledge of how it arrived at the Biltmore? A. I have none whatsoever, except to say that was there in the room and showed to me when—after I had come into the room. I have no idea.
>
> Q. Who showed it to you? A. I don't remember now. I don't remember at all.
>
> Q. Well, what did the people at the Biltmore have to say about the source of this literature? A. If I recall, I asked them where they got this piece of literature, and they said that the captains from the districts were bringing them in. And from the way they talked I assumed that they had more. I thought they had. Well, it was in my own mind, but I felt they had better than 20 of them. The way they said the captains were bringing them in. It seemed to be a multiple operation rather than just one, but the one they showed me was a very rolled up—it had been straightened out now, but it appeared to have rolled up and creased or it had been left lying somewhere, and a person might roll it up and throw it away.

Appendix "A"

On August 31, the Levitt headquarters released a copy of the "Anti-Semitic" circular to the press and on the following day this leaflet was exhibited over television by Comptroller Levitt.

Troy gave sworn testimony that on September 4th, five days after the "Anti-Semitic" circular exhibit was released by Levitt Headquarters, an unknown person brought a copy of this leaflet to his office at the Queens Village Democratic Club. Troy said that this was the first time he knew of any such circular in the Queens Village area. He stated that he thought the bearer of this circular "might be planted or he might be being used by somebody to plant it in our area to give credence to the story that was being told". Troy stated that he brought the "Anti-Semitic" circular to Levitt headquarters on September 5 or 6. At that time, according to Troy, he told the Levitt campaign staff that he "doubted the authenticity of the piece of literature."

We have been advised by expert printers that the anonymous "Anti-Semitic" leaflet was an "amateur's job". These printers are of the opinion that the composition of the circular indicates that it was printed by an unskilled and inexperienced person.

Commissioner Lucia and all of the Sanitation Department employees interviewed, denied any knowledge of the printing or distribution of the anonymous "Anti-Semitic" leaflet. In fact, Lucia opined that the circular was an "opposition plant". Interviews by our field staff with registered Democratic voters in the 9th Assembly District in Queens uncovered no person who had received a copy of this anonymous leaflet.

Harold Fisher, Chairman of the Brooklyn Democratic Law Committee, identified by Levitt headquarters as a second complainant in this matter, was also interviewed by our staff. Fisher recalled receiving complaints about anti-Semitic arguments being used by Wagner workers.

However, he was unable to identify any person who made such complaints. He further stated that he had no information about the distribution of the anonymous "Anti-Semitic" leaflet and saw it for the first time when Comptroller Levitt appeared on television on September 1.

We enlisted Comptroller Levitt's aid in tracing the source of the anonymous "Anti-Semitic" circular utilized in his public statement of August 31 and his television appearance of September 1. He referred our staff to William Vanden Heuvel, a campaign advisor. Comptroller Levitt, in a letter to Special Assistant Attorney General Bonomi, dated October 19, 1961, stated, "I was handed the literature in my New York City Headquarters by Mr. William Vanden Heuvel".

Vanden Heuvel, upon interview, said that he had no personal knowledge how many copies of the "Anti-Semitic" circular arrived at Levitt Headquarters but speculated "I would presume it came from Matthew Troy or his captains, or the people in that area who received it. It possibly could have come anonymously in the mails as many things that crop up in campaigns unfortunately arrive".

No other campaign advisor at Levitt Headquarters was able to cast any light on the source of the anonymous "Anti-Semitic" leaflet. A few believe, however, that Matthew Troy, Jr., had reported the distribution of this literature in the Queens Village area prior to September 1.

Troy was also interviewed concerning the Levitt charge that anti-Semitic arguments were being used by Wagner workers in door-to-door campaigns. He said that two captains in his Assembly District reported the use of anti-Semitic arguments by Wagner campaign workers. However, Troy refused, under oath, to identify these captains or give any information about complaints of this nature in the Queens Village area. Only one of Troy's election captains, Salvatore Sciame, stated that he heard such reports. He said that unidentified customers of his grocery

store told him "that somebody had approached them saying that it would be a situation (if Wagner lost the primary) where a Jew would be running against a Jew". Interviews by our staff in Sciame's election district failed to uncover any Democratic voter who heard anti-Semitic arguments being used by Wagner workers. The Sanitation Department personnel appearing before our staff denied any such activity.

* * * * *

We will submit a *final* report at a later date concerning our further investigative findings, conclusions and legislative recommendations.

In closing this *interim* report, we wish to express our appreciation to the Attorney General for the cooperation afforded this investigation in generously providing office space and extensive clerical help. We might also note that the Attorney General has scrupulously adhered to his pre-investigation pledge to give our staff a "free hand" in the conduct of this inquiry.

APPENDIX "B"

Final Report

To: Honorable Louis J. Lefkowitz
Attorney General of the State of New York

From: John G. Bonomi
Special Assistant Attorney General
Counsel, New York City Fair Campaign Practices Committee

Re: Printing and Distribution of Anonymous Campaign Literature in 1961 Primary and General Elections in New York City

Introduction

This is the "Final Report" of the Attorney General's investigation into the printing and distribution of anonymous literature during the 1961 primary and general election campaigns in New York City. On November 3, 1961, we publicly released our "Interim Report".

In this report, we have incorporated additional investigative findings and our legislative recommendations. Our investigative findings concern campaign literature which may have been printed, distributed and financed in violation of § 781-b of the Penal Law and/or Article 13, §§ 320-328 of the Election Law (see Appendix I for full text of § 781-b, Penal Law). In addition, we have conducted two studies which suggest serious defects in Section 781-b.

Section 781-b provides criminal penalties for the printing of any campaign literature which does not identify either the printer or sponsoring organization.

Article 13 of the Election Law requires that "political committees" file detailed statements of all campaign receipts and expenditures (including those financial transac-

tions which relate to the printing and distribution of campaign literature) with both the New York Secretary of State and the New York City Board of Elections. A "political committee" is defined by this Article as any group of three or more persons cooperating to aid in the election or defeat of a political candidate (§ 320, Election Law).

Under § 776 of the Penal Law, a treasurer of a "political committee" who neglects to file the financial statement required by the Election Law is subject to criminal penalties. Any person who knowingly and willfully violates any other section of Article 13 is chargeable with a misdemeanor under § 783 of the Penal Law (see Appendix II for full texts of §§ 776 and 783, Penal Law).

Summary of Findings

In our November 1961 "Interim Report", we found no evidence, whatsoever, to support a complaint by the regular Democratic organization that an anonymous "Anti-Semitic" leaflet had been distributed by workers for Mayor Robert F. Wagner.

We did, however, establish that the regular Democratic organizations in the Bronx and Brooklyn distributed anonymous literature during the 1961 primary campaign implying that the Mayor was a "Communist Puppet". We further ascertained the identity of two printers responsible for the illegal printing of 150,000 copies of this anonymous literature (§ 781-b, Penal Law).

Now, in this "Final Report", we set forth the results of the following investigations and studies:

(1) *"Communist Puppet" Kit*

Since our "Interim Report" on "Communist Puppet" literature, we have obtained the *sworn* testimony of Philip

Gilsten, a Bronx Democratic leader and Executive Member of the North End Democratic Club. Gilsten's sworn testimony confirmed our interim finding that the North End Club acted as a distribution center for "Communist Puppet" circulars.

An examination of the records of the North End Club disclosed no evidence of expenditures for the printing of anonymous literature. However, these records were maintained by Gilsten in clear violation of those provisions of the Election Law which require detailed accounting of campaign receipts and expenditures.

(2) *"Wagner Committee"*

John J. Gilhooley, a Republican candidate for City Controller, denounced a political advertisement in the November 4 issue of the "Irish Echo", a weekly newspaper, as a "minority appeal". The ad was bare of sponsor's identification except for a line reading "Independent Citizens Committee for Wagner, Screvane and Beame".

Wagner Campaign Manager Edward P. Cavanaugh promptly disavowed the ad as "unauthorized" and "deplorable". Upon interview, Sean Keating, then Assistant to the Mayor, defended the ad as not "too outrageous".

Our inquiry revealed that the ad's sponsoring committee was conceived at a meeting between Keating and two friends at Wagner headquarters. Keating said that his overriding concern was whether "they had Wagner, Beame and Screvane's name" on the ad and claimed only a casual interest in the committee's activities after the first meeting. The evidence indicates that the committee was formed without the knowledge or authorization of the Mayor and subsequently operated independent of Wagner headquarters.

There are no provisions in the Penal or Election Laws governing the identification of sponsors of political ads

appearing in newspapers, magazines and other periodicals. As a consequence, such a sponsoring group may remain anonymous or identify itself in a vague and misleading manner.

(3) *"Anonymous Posters"*

Our second study involved anonymous (but non-scurrilous) political posters exhibited in Democratic primary contests in the Yorkville and East Harlem areas of New York. These posters, which came to our attention during the interim investigation, supported the regular organization candidate for District Leader and City Councilman in those areas, John J. Merli. Our staff uncovered the printer and financier of these placards.

Under § 781-b of the Penal Law, a printer may be held criminally responsible for those anonymous posters which relate to the election of "public officers" such as city councilmen. However, he may not be prosecuted for printing anonymous placards which concern a district leader contest since elections of "party officers" are omitted from the provisions of Section 781-b.

(I)

INVESTIGATION RE: "COMMUNIST PUPPET" KIT

Philip Gilsten, Democratic leader in the Eighth Assembly District of the Bronx and Executive Member of the North End Democratic Club, had been interviewed at the North End Club on October 4. At that time, Gilsten readily admitted that an anonymous campaign packet implying that Wagner was a "Communist Puppet" was distributed in the Bronx under the auspices of the North End Democratic Club. He described the North End Club as a "drop" for a substantial portion of the Levitt campaign

literature distributed in the Bronx. Gilsten further explained that all of the regular Democratic clubs in the Bronx used the North End's facilities for the "processing" of campaign material because of its spacious quarters and considerable experience in this activity.

Gilsten, in the October 4 interview, stated that workers from all of the regular Bronx Democratic clubs came to the North End Club to aid in the preparation of the anonymous "Communist Puppet" kit for distribution. He also reported that some of the anonymous kits were mailed directly from the North End Club, while others were circulated by the regular Democratic clubs in their own areas.

Gilsten, at that time, characterized the anonymous "Wagner Puppet" leaflet as "brilliant" in conception. He said the distribution of the anonymous kit was dictated by "politics" and commented, "we were fighting for our political life".

In order to obtain the *sworn* testimony of Gilsten and ascertain whether the North End Club had ordered any of this anonymous literature, we served Gilsten, on October 4, with a personal subpoena and a subpoena duces tecum calling for certain books and records of his organization. Gilsten did not appear at the Attorney General's office on the return date of the subpoena, October 6. October 8, Justice George Tilzer signed an order to show cause in the New York State Supreme Court why both subpoenas should not be vacated or modified. Justice Tilzer also signed a stay order enjoining the Attorney General from taking "any steps or proceedings to compel the appearance" of Gilsten or the production of the North End's books. The motion was argued in Part I of the New York Supreme Court in October 10. On November 20, Justice Owen McGivern ordered Gilsten to appear at the Attorney General's office on November 28 and produce certain books and records of the North End Club.

On this latter date, Gilsten appeared and was examined under oath. Gilsten admitted, in his sworn testimony, that the North End Democratic Club acted as a distribution center for the anonymous "Communist Puppet" literature circulated in the Bronx.

Gilsten swore that he had no idea where the anonymous "Communist Puppet" literature was printed or how this material arrived at the North End Club. [It should be noted that during the interim investigation, we established that certain of this anonymous literature was ordered at the city-wide regular Democratic headquarters; printed by two New York City concerns; and that nine cartons of "Communist Puppet" kits were obtained by City Councilman Thomas J. Cuite after a brief conference with Gilsten and his aides at the North End Club.]

Meager financial books and records were produced by Gilsten in response to the subpoena duces tecum. The North End Club's financial records consisted almost entirely of cancelled checks, bank statements and check stub books. However, a major portion of the club's 1961 primary campaign receipts and expenditures were in cash and non-recorded.

Gilsten acted as de facto treasurer for the 8th Assembly District's "Political Committee" (actually the North End Democratic Club) in the 1961 Democratic primary. He stated that he personally collected all monies contributed to the committee for the primary campaign and also supervised all expenditures.

As previously indicated, Article 13 of the Election Law makes the "treasurer" of a "political committee" responsible for maintaining certain financial records and filing prescribed statements with tthe Board of Elections and the Secretary of State. A record search showed that neither the "treasurer" nor any other person associated with the 8th Assembly District's "political committee" had

filed a financial statement with the Secretary of State as required by § 324 of the Election Law.

This search also revealed a violation of § 325 of the Election Law in that no statement had been filed with the Secretary of State identifying the "treasurer" of the 8th A. D. "political committee".

Furthermore, § 325 as supplemented by § 327 of the Election Law requires the "treasurer" of a "political committee" to maintain a "detailed account" of all campaign receipts and expenditures, including a "receipted bill" stating the particulars of each expense. Gilsten's sworn examination revealed that he did not maintain ordinary business accounts and had no "receipted bills" for most expenses incurred.

The records produced by Gilsten established that Benjamin Gluckow, Secretary to Congressman Charles Buckley, filed a financial statement with the Board of Elections for the 8th A. D. "political committee" on September 28, 1961. However, this statement was contrary to the requirements of § 321 of the Election Law in that it was unsworn and failed to set forth the particulars prescribed by the statute.

No pre-primary financial statement was filed with the Board of Elections or the Secretary of State as required by § 323 of the Election Law.

(H)

STUDY RE: "WAGNER COMMITTEE"

The November 4 issue of the "Irish Echo", a weekly newspaper, situated at 1849 Broadway, New York County, contained a full page political advertisement which identified the sponsoring group as the "Independent Citizens Committee for Wagner, Screvane and Beame". No committee address or sponsoring member was listed.

Appendix "B"

This advertisement featured a headline which stated:

"THE IRISH VOTER PUT KENNEDY IN THE WHITE HOUSE LET'S SEND WAGNER AND HIS TEAM BACK TO CITY HALL"

On November 5, John J. Gilhooley, the Republican candidate for City Controller, denounced the "Irish Echo" advertisement. He stated, "This Wagner advertisement is an insult to the Presidency of the United States; it is an insult to President Kennedy himself who never made such minority appeals." Gilhooley exhorted the Mayor, "Don't drag us back into a time when 'we' meant a minority group in a racial or political or social ghetto."

Since the advertisement was not anonymous and appeared to accurately identify the sponsor as a "Wagner Committee", Gilhooley's charge was not initially investigated by our staff. However, in response to an inquiry from the New York City Fair Campaign Practices Committee, Edward P. Cavanaugh, Mayor Wagner's campaign manager, stated that the sponsoring group was "unauthorized" and that Wagner headquarters "deplored this type of campaigning". At the request of the New York Fair Campaign Practices Committee, we thereupon initiated a study of this situation.

In the initial stages of this inquiry, we were informed by the editors of the "Irish Echo", that one John O'Donnell, a restaurant owner, whose home address was unknown, had ordered the ad. After considerable investigation we located O'Donnell, and he was examined under oath at the Attorney General's office concerning the make-up of the "Independent Citizens Committee for Wagner, Screvane and Beame". This portion of the examination proceeded as follows:

"Q. You see at the bottom of that exhibit (advertisement in 'Irish Echo') there is 'Independent Citizens Committee for Wagner, Screvane and Beame'.

Who are the people on that committee? A. Jim (Fitzpatrick) would know better than me.

Q. Do you know? A. No. I'm a member of a committee in connection with that ad, I'm a member of a committee of three, I suppose you call it. That's the way it originated between Keating, Fitzpatrick and myself.

Q. As far as you know, the Committee is made up of Sean Keating, Fitzpatrick and yourself. A. Possibly.

Q. Don't you know? A. I know we were three of the members."

O'Donnell relayed that some time prior to the general election on November 7, 1961, he and James Fitzpatrick, a salesman, met with a long time friend, Sean Keating, then Assistant to the Mayor, at Wagner campaign headquarters in the Hotel Astor.

O'Donnell said that the purpose of this visit was to purchase tickets for a Wagner campaign banquet. However, during the course of the meeting, Fitzpatrick suggested that it would be "nice if we had a full page ad in the 'Irish Echo'" endorsing Mayor Wagner. Then, according to O'Donnell, Fitzpatrick volunteered to act as treasurer of the group; Keating wrote some innocuous advertising copy; and O'Donnell telephoned James A. Callahan, advertising agent of the "Irish Echo", to make preliminary arrangements for the advertisement.

O'Donnell said that at a later meeting in O'Donnell's restaurant, Callahan wrote the portion of the advertisment characterized by Gilhooley as a "minority appeal". O'Donnell stated that Callahan also "dreamt-up" the name to be given to the sponsoring group, "Independent Citizens Committee for Wagner, Screvane and Beame".

James Fitzpatrick, a district sales manager for a New York concern, gave sworn testimony in the "Wagner Com-

mittee" inquiry. Fitzpatrick stated that he had known Keating socially for about twenty years. His version of the meeting with Keating at the Hotel Astor was substantially the same as O'Donnell's. Fitzpatrick stated that his sole function with the committee was to act as treasurer.

Upon interview, James Callahan, the advertising agent for the "Irish Echo", stated that on October 26, 1961, O'Donnell called him at the newspaper offices concerning a proposed political advertisement. Callahan said that he met the same day with O'Donnell and Fitzpatrick to make arrangements for the insertion of the ad in the "Irish Echo". Callahan's version of this meeting was brought out in the following questions and answers:

> "Q. Who suggested that the caption should be put on the advertisement 'Independent Citizens' Committee for Wagner, Screvane and Beame'? A. Well, I said, 'Now fellows, whose going to pay for this ad?' They said, 'We are.' I said 'O. K.' Now I had to have a source. They said 'Independent Citizens' Committee for Wagner, Screvane and Beame'.
>
> Q. Who said it? A. Both of them.
>
> Q. Mr. O'Donnell and Mr. Fitzpatrick? A. Yes."

Callahan further stated that he had written the "minority appeal" headline for the advertisement in order to give it "zip" and "a punch line".

Callahan said that the price of the ad was $400. John Grimes, the business manager of the "Irish Echo" stated that on December 1, Fitzpatrick paid for the advertisement with $395 in cash and a $5 check.

A search of the records of the Board of Elections and Secretary of State revealed that Fitzpatrick as "de facto treasurer" of an "informal committee for the placing of an ad in the 'Irish Echo' to support the re-election of Hon. Robert F. Wagner" (actually the so-called "Inde-

pendent Citizens Committee for Wagner, Screvane and Beame") had filed the financial statements required of "political committees" under the Election Law. This statement identified eighteen persons who had allegedly contributed $350 and pledged $50 for the "Irish Echo" advertisement. The listed contributors included John J. O'Connor, a business associate of Keating's in the Fairways Travel Agency, 589 West 207th Street, New York County.

Further inquiry disclosed that the donors were all social or business friends of Keating, Fitzpatrick and O'Donnell. Several of the contributors stated that they made donations out of "friendship" rather than political conviction and that they were actually supporters of Lawrence Gerosa, a third-party candidate in the mayoralty race.

Sean Keating, former Assistant to the Mayor and now Regional Director of the United States Post Office was interviewed on November 15, 1961. Keating substantiated the statements of O'Donnell and Fitzpatrick concerning the initial meeting at the Hotel Astor. He denied any further active participation in the committee's work.

Keating defended the committee's ad, stating "I didn't see anything too outrageous. Just as long as they had Wagner, Beame and Screvane's name on there, that's what I was concerned with."

He said that even though the idea for sponsoring the "Irish Echo" advertisement originated in his office at Wagner headquarters, the committee was "unauthorized". He stated that Wagner Campaign Manager Cavanaugh "called me at my room and said 'who the hell put this ad in? Did we authorize that?' I said, 'No.' I said 'It was somebody else entirely'. So he was satisfied then because somebody had evidently brought it to his attention."

When Keating was asked whether he had ever made an inquiry concerning the full membership of the committee, he retorted, "No, because I knew that O'Donnell and

'Fitz' had taken the ad out and I assumed that they were the Independent Citizens because they're both independent and they're both citizens."

(III)

STUDY RE: "ANONYMOUS POSTERS"

During this investigation, we were informed that anonymous (but non-scurrilous) political posters were being exhibited in the Yorkville and lower East Harlem areas of New York County. One of these posters depicted Carlos Rios, an "insurgent" primary candidate for Democratic Leader in the 10th Assembly District of New York County as a "puppet" of Assemblyman Mark Lane. Another anonymous poster showed Robert Low, an "insurgent" Democratic Councilman candidate in the 22nd Senatorial District as a "puppet" of Mayor Wagner. Both of these posters endorsed the candidacy of John J. Merli, the "regular" Democratic organization candidate in the District Leader and Councilman primaries.

A field survey revealed that about thirty such anonymous posters were in evidence in these areas.

Further investigation revealed that Maxwell Mokut, Chairman of the "Independent Democrats for the Re-election of John J. Merli" had ordered and paid for these posters. Our investigation also established that David Schoer, the owner of Grenshaw Studios, 25 West 26th Street, New York County, drew the "puppet" cartoons featured on both posters; and that Henry Fuchs, a printer operating under the trade name of Sun Litho Art, 135 West 25th Street, New York County, printed "a thousand or two thousand" copies of these anonymous placards.

Upon examination, Fuchs stated that although he had printed political posters previously, "I don't put no identification on none of my printing".

Appendix "B"

Legislative Recommendations

We, in New York, are in the "horse and buggy age" in the consideration of legal weapons to combat *anonymous* "hate literature".

The great preponderance of campaign "hate literature" is ordered, printed and distributed in a furtive and conspiratorial manner. There is a compelling reason for this secrecy. The political leaders responsible for the dissemination of "hate literature" live in mortal fear of discovery by an aroused and enlightened electorate.

We believe that the most effective legal means for fighting hate peddlers is to remove their cloak of anonymity. If these persons are clearly identified, the voting public may avail itself of a potent weapon—retribution at the polls.

The constitutionality of the identification requirements of the Federal Corrupt Practices Act (which are substantially similar to those in the New York statute) has been upheld in *United States* v. *Scott* (U.S.D.C., Nor. Dak., 1961) not off. cit., 30 U.S.L.W. 2066, relying on *Communist Party* v. *S.A.C. Board* (1961), 367 U. S. 1.

Of course, the mere passage of a criminal statute requiring clear identification of the sponsors of campaign literature will not guarantee success. Those agencies responsible for the supervision of elections and prosecution of criminal offenders must be vigilant and dedicated. They must be ever ready to dig out those who print, distribute and finance anonymous campaign literature. And the voting public must be constantly alerted to such unfair campaign practices by a responsible and free press.

The only New York statute which even remotely bears on the problem is § 781-b of the Penal Law. This statute prohibits the *printing* of anonymous campaign circulars. However, Section 781-b is riddled with inequities and omissions. Thus, a political leader responsible for the *ordering* and *distribution* of anonymous campaign literature is im-

mune from prosecution; anonymous political advertisements in newspapers, magazines and other periodicals are omitted from provisions of the statute; and anonymous circulars may be printed with impunity if they concern an election of a "party officer", such as a district leader.

It is true that the publisher of a written statement which defames an individual may be held criminally responsible (Penal Law, § 1341) and civilly liable. However, these remedies are grossly inadequate where political candidates or public officials are the aggrieved parties. (See Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875.)

The weaknesses inherent in these statutes are compounded by the administration of the election laws in the City of New York. Our investigation indicated that the Board of Elections has not exercised certain of its statutory powers.

For example, under § 38 of the Election Law, the Board "and any of the commissioners thereof may require any person to attend before the board or a commissioner at the office of the board or a branch office and be examined by the board or a commissioner as to *any matter* in relation to which the board is charged with a duty under this chapter or concerning violations of this chapter, or of the provisions of the penal law relating to the elective franchise, and may issue subpoena therefor . . ." (Emphasis by our staff.) Yet, even where violations of the Election and Penal Laws were apparent (i.e., printing of anonymous "Communist Puppet" literature and failure of the North End Club to file a pre-primary financial statement) the Board undertook no inquiry.

In view of the enumerated defects in the law and its administration, we are making the following legislative recommendations to the Attorney General:

1. That § 781-b of the Penal Law be amended to prohibit any person from "printing, publishing or distribut-

ing" anonymous campaign literature or "causing" such literature "to be printed, published or distributed".

As it stands, Section 781-b neither deters nor punishes those primarily responsible for anonymous campaign literature—the financier and distributor. Under the proposed amendment, persons who print, finance or distribute anonymous campaign literature, could be criminally prosecuted.

2. That Section 781-b be amended to require that campaign literature bears both the name and address of the printer *and* the name and address of the specific person and organization which ordered the ad.

The present statute is phrased in the alternative, requiring identification of the printer *or* "the person and committee at whose instance" the circulars were printed. Hence, the sponsors may remain anonymous and comply with the law.

3. That Section 781-b be amended to provide criminal penalties for the printing, ordering or distribution of anonymous literature in campaigns for "party" as well as "public" office.

The present section applies to "any election of public officers, (or) candidates for nomination for public office"; i.e., general and primary elections for Mayor, City Councilman, etc. The statute does not proscribe the printing of anonymous literature in campaigns for "party office", such as district leader.

4. That Section 781-b be amended to prohibit newspapers, magazines and other periodicals from printing or publishing campaign advertisements which do not identify the person and committee sponsoring the ad by name and address.

Under the present law, sponsors of such ads may remain anonymous or identify themselves in a nebulous and misleading manner.

Our inquiry disclosed that most newspapers and other periodicals circulated in the New York City area require proper identification of sponsors of political advertisements. However, this voluntary practice is not universal. As a result of vague sponsor identification, the "Irish Echo" ad was initially attributed to Wagner headquarters and provoked charges of official Democratic endorsement of a "minority appeal". Only painstaking investigation disclosed that the committee name was apparently the product of an advertising agent's imagination and the sponsoring group operating independent of Wagner headquarters.

We believe that any laxity on the part of agencies supervising the conduct of elections cannot be cured by legislative mandate. In this area, the need is not for additional laws, but for officials with an awareness of their powers and responsibilities under existing statutes.

The following Special Assistant Attorneys General participated in this investigation of anonymous campaign literature and the preparation of our interim and final reports: Manuel Guerreiro; Alexander Holtzman; Donald A. Hopper; Allan A. Pines; William Rand, Jr.; and Walter Wager.

Three investigators aided our staff in the conduct of field investigations: John L. Cronin, New York State Police; Charles M. Eidel, New York State Police; and James Malone, Election Frauds Bureau, Office of the Attorney General.

Appendix "B"

We wish to express our appreciation to Attorney General Louis J. Lefkowitz and State Police Superintendent Arthur Cornelius, Jr. for placing these investigators at the disposal of our staff. In addition, the Attorney General generously provided office space and clerical aid.

We wish to note that the Attorney General scrupulously adhered to his pre-investigation pledge to allow our staff a completely "free hand" in the conduct of this inquiry.

APPENDIX I

§ 781-b—Penal Law

"§ 781-b. *Printing or other reproduction of certain political literature.* No person shall print or reproduce in quantity by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the State Constitution whether in favor of or against such political party candidate, committee, person, proposition or amendment to the State Constitution, in connection with any election of public officers, candidates for nomination for public office, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof or of the person and committee at whose instance or request such handbill, pamphlet, circular, post card, placard or letter is so printed or reproduced, and no person nor committee shall so print or reproduce for himself or itself any such handbill, pamphlet, circular, post card, placard or letter without also so printing or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitute a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee, at whose instance or request a handbill, pamphlet, circular, postcard, placard or letter is printed or reproduced by such principal, and does not include a person working for or employed by such a principal."

APPENDIX II

§§ 776 and 783—Penal Law

"§ 776. *Failure to file statement of receipts, expenditures and contributions.* Any candidate for election to public office, or any candidate for nomination to public office at a primary election, or any treasurer of a political committee as defined by the election law, who neglects to file, as required by the election law, a statement of receipts, expenditures and contributions shall be guilty of a misdemeanor."

"§ 783. *Crimes against the elective franchise not otherwise provided for.* Any person who knowingly and wilfully violates any provision of chapter seventeen of the consolidated laws of this state, known as the election law, which violation is not specifically covered by any of the previous sections of this article is guilty of a misdemeanor."